IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
CIVIL

Not Restricted

No. CI-02-02198

MACQUARIE LEASING PTY LTD (ACN 002 674 982) — Plaintiff

V

DARYL RONALD FOLEY — First Defendant

And

RICHARD SIMON EVANS — Second Defendant

JUDGE:	HIS HONOUR JUDGE DYETT
WHERE HELD:	Melbourne
DATES OF HEARING:	15, 16, 17 and 20 October 2003
DATE OF JUDGMENT:	6 November 2003
CASE MAY BE CITED AS:	
MEDIUM NEUTRAL CITATION:	[2003] VCC

REASONS FOR JUDGMENT

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr G. Pauline	Douros Lawyers
For the first Defendant	Mr M. Simon	Jonathan Kemp & Associates

The second Defendant appeared in person

HIS HONOUR:

1 The plaintiff Macquarie Leasing Pty Ltd ("Macquarie") is a subsidiary company of Macquarie Bank Ltd, and leases vehicles and equipment for commercial use. It sues the first defendant, Daryl Ronald Foley ("Foley") for damages for the alleged breach of a commercial hire-purchase agreement entered into on or about 12 May 1998, pursuant to which Macquarie hired to Foley a two-door sports car known as a TVR Chimaera ("the blue Chimaera").

2 The supplier of this vehicle, John Cant Motors, was the sole Queensland distributor of these TVR sports cars. By letter (Exhibit M, p.93 CB) of 12 May 1998, Marion White of John Cant Motors advised Money Resources Commercial, which introduced Foley as a hire-purchase client to Macquarie, that the registration number of the blue Chimaera was TVR 40.

3 Exhibit H (pp.78-83 CB), the commercial hire-purchase agreement of 12 May 1998, and Exhibit G (p.77 CB), the invoice from John Cant Motors, reveal that the original purchase price was $146,303. The deposit of $11,303 was paid on behalf of Foley, and Macquarie contributed the balance of the purchase price of $135,000. This was repayable by Foley, as hire purchaser, by 60 instalments of $2,338.84 on the 12th of each month, commencing 12 May 1998, and a final instalment of $40,500 on 12 May 2003.

4 There was an overdue interest rate of 8% per annum stipulated in the agreement. The applicable law was the law of Victoria, and the vehicle was to be garaged at Foley's residence, 11 Fountain Drive, Narre Warren.

5 The following history was either common ground or based upon my findings of fact on the balance of probabilities, wherever matters were disputed:

6 The second defendant, Richard Simon Evans ("Evans"), was a friend and business partner of Foley's. The hire-purchase acquisition of the blue Chimaera was Evans' idea. He had hired a Chimaera for a weekend in Melbourne from the owner, whom he knew, of a business trading as Great Cars. Six months later, the owner of Great Cars notified him that there was a Chimaera for sale at John Cant Motors in Queensland, and suggested that the vehicle could be rented out on behalf of Evans from the car yard of Great Cars. Evans persuaded Foley to acquire the Chimaera with the object of making additional income from hiring it out. Evans then journeyed to Queensland, along with his then girlfriend, Lisa Noelle Lou ("Ms Lou"), and conducted the negotiations on Foley's behalf, whereby the hire-purchase agreement on the abovementioned terms resulted.

7 Despite the description of this vehicle as "new" in the application for finance (Exhibit C, pp.52-56 CB), in the Macquarie leasing application (Exhibit D, pp.62-64 CB), in the invoice of John Cant Motors (Exhibit G, p.77 CB), and the hire-purchase agreement (Exhibit H, pp.78-83 CB), the car broke down 50 kilometres from the motor trader's yard, and again when Evans and his girlfriend reached Sydney in the vehicle. It was brought to Melbourne on the back of a truck, and was in and out of a mechanic's shop in Melbourne, so much so that it could not be used for its intended purpose as a hire car. Evans described the car, seemingly aptly, as a "total lemon".

8 In October 1998 repayments under the agreement first fell into arrears. In November 1998 Evans moved to Sydney and took the car with him. He initially lived with Ms Lou at 199 Regent Street, Redfern.

9 Both Evans and Ms Lou gave evidence that they had a number of meetings with the customer account manager of Macquarie, Paul Ian Peterson ("Peterson"), starting from about September 1998, advising Peterson about the problems with the blue

Chimaera and the negotiations with the importer of Chimaeras, namely TVR Queensland, leading up to the exchange of the blue Chimaera for a new vehicle ("the green Chimaera") in January 1999.

10 By contrast, Peterson was adamant that he did not meet Evans until December 1999, when Evans called at the plaintiff's office in Hunter Street, and Evans there informed Peterson that he was a business partner of Foley, who was suffering from anxiety and should not be contacted; further, that he, Evans, had possession of the vehicle and would handle all payments. Peterson said that there were quite a number of conversations about repayments, which were in arrears, and that it was common for Evans to leave undated cheques with Peterson and ring and ask him not to bank such cheques until the account was in funds. In January 2000 he was told by Evans that the vehicle was uninsured and in a smash-repairers at Waterloo. Peterson inspected the vehicle at the repairer's premises and maintained that he was unaware that it was a replacement vehicle.

11 On 11 April 2000, Peterson sent to Foley a proposed Guarantee and Indemnity for signing by him, as hirer, and forwarding on to Evans for the latter's execution as guarantor. A copy of this document (Exhibit S, pp.122-124 CB) was signed by both Foley and Evans when they called upon Peterson at Macquarie's Hunter Street office on 23 May 2000. The description of the "goods" in the document signed contained the vehicle identification number and engine number of the blue Chimaera, consistent with Peterson being unaware of the exchange of vehicles up to that point, and Peterson maintained that he was first told of the replacement green Chimaera at that meeting. On the other hand, the history of arrears of repayments by Evans, and lack of action to repossess on the part of Macquarie up to that time, strongly supports the versions of Evans and Ms Lou, and there is a puzzling absence of notes

in the Macquarie file during 1998 and most of 1999, despite the irregular repayments under the hire-purchase agreement during that time.

12 The green Chimaera had the same Queensland registration plates as the blue Chimaera, and apparently had been registered in Queensland in January 1999, according to the vehicle inspection report (Exhibit U, p.199 CB). Evans used this replacement vehicle for about nine months, until the police checked the car in the New South Wales suburb of Surry Hills and advised Evans that the vehicle needed a New South Wales registration, as he had been resident in New South Wales for more than three months at that time.

13 Evans visited the NSW Road Traffic Authority, where registration was queried, although the reason why was not made clear to Evans, and seemingly not then known by the Authority.

14 On 19 May 2000 Evans obtained the vehicle inspection report (Exhibit U) and, together with Foley, who had come from Melbourne, again visited the New South Wales RTA, where registration was refused. Evans and Foley then went to Peterson on 23 May 2000 and sought the assistance of Macquarie in reregistering the green Chimaera. Each defendant swore that they had signed Exhibit S, the Guarantee and Indemnity (Foley as hirer and Evans as guarantor) pursuant to an agreement with Peterson which included the right to sell the green Chimaera and use the proceeds towards repayment of the unpaid principal due to Macquarie, on the conditions that interest on the unpaid principal would be frozen, i.e. no longer accrue, while they were attempting to sell the vehicle; that Macquarie would not repossess the vehicle, would refrain from legal proceedings, and would not notify the Credit Reference Association of the default.

15 Peterson conceded that it was agreed that Evans could sell the green Chimaera and

that he, Peterson, undertook not to notify the Credit Reference Association of the default in repayments, but denied that there were any further conditions.

16 On 26 May 2000, Peterson, by letters (Exhibits V, p.125, and W, p.126 CB) dated 26 May 2000, forwarded copies of the executed Guarantee and Indemnity to each defendant, noting in each letter the advice that "the motor vehicle described in that agreement was replaced by TVR under their warranty exchange program", and confirming the details of the replacement vehicle, including the vehicle identification number and engine number. The letters also enclosed copies of the Standard Terms and Conditions (Exhibit B, p.39 CB), and the original contract (Exhibit H, p.78 CB). The latter document, in Clause 3.1, acknowledged that the Standard Terms and Conditions formed part of the hire-purchase agreement. These documents, read together, make it clear that the plaintiff and both defendants were agreeing that the original hire-purchase agreement (Exhibit H, p.78 CB) would continue, subject to the green Chimaera replacing the blue Chimaera, and that Evans, pursuant to the guarantee and indemnity (Exhibit S, p.122 CB), was guaranteeing the due performance by Foley of all his obligations under the hire-purchase agreement and indemnifying Macquarie in respect of all losses arising from any breach of Foley's obligations under the hire-purchase agreement.

17 It was beyond dispute, however, that the requirement under the hire-purchase agreement that the vehicle be kept at Foley's address at 11 Fountain Drive, Narre Warren, Victoria, was waived by Peterson on behalf of Macquarie, as was the prohibition in Clause 6.6 in the Standard Terms and Conditions (Exhibit P, p.43 CB) precluding the hirer from selling the vehicle.

18 On 7 August 2000 Peterson was informed by Evans that the green Chimaera had been damaged in a collision and repaired by Cremorne Prestige Services, which

refused to release the vehicle until the cost of the repairs was paid. Peterson rang Greg Peirce, of Cremorne, and secured release of the vehicle upon Evans paying $6,900 towards the cost of repairs. It appears that this agreement was reached after a threat by Peterson to Peirce that otherwise Macquarie would repossess the car.

19 In October 2000 Evans advised Peterson of two offers from potential purchasers of the green Chimaera – one for $70,000 and another for $65,000. Each proposed sale fell through, apparently when the difficulties in reregistering the vehicle became known.

20 Payments of $2,300 and $1,150 were made by Evans on 25 and 29 May 2000, and a further payment of $2,300 on 26 June 2000, and then two lots of $2,000 in December 2000, followed by a last payment of $2,000 on 15 January 2001 (Exhibit X, p.202 CB). Macquarie's file notes (Exhibit A, p.38 CB), record a request for arrears by Peterson on 30 October 2000 when he was advised of a possible sale for $70,000, and a promise by Evans to repay the shortfall at $1,000 per month on 31 October 2000 when he said that he had a purchaser for $65,000.

21 On 26 November 2000 Evans faxed to Peterson (Exhibit Y, p.127 CB) an offer of further security:

> "... for the TVR Chimera (40TVR) as follows. Letters from the vehicle's owners and their respective VIN, Chassis and Engine No's to follow.
>
> 1) 1959 Morris Minor (Concourse Condition) est value: $15,000.
> 2) 1995 Toyota Hiace est value: $14,000
> 3) 1989 Mazda 929 est value: $8,000
> 4) 1992 Ford Falcon est value: $7,000 "

22 The Morris Minor was owned by Ms Lou, who subsequently refused to provide her car as a security, and Evans later advised Peterson that the security was no longer

available.

23 On or about 12 January 2001 Evans gave Peterson a cheque for $2,000 bearing that date, drawn on the Commonwealth Bank account of his company, Australian Communications Territories Pty Ltd (Exhibit Z, p.128 CB), but told him not to present it, as the money was not available at the time.

24 On 5 February 2001 the Macquarie file notes (Exhibit A) record a phone call from Evans promising a payment "tomorrow". This payment was not received.

25 On 15 March 2001, Notices of Termination (Exhibits AA and BB, pp.133-4 CB) signed by Peterson on behalf of Macquarie were mailed to both defendants. Foley maintained that he did not receive Exhibit AA, and that some of his mail had gone astray about that time. Peterson could only swear that he left the original documents in his out-tray for mailing, but, applying the presumption of regularity, I draw the inference that Exhibit AA which was tendered for identification was posted to Foley's address at 11 Fountain Drive, Narre Warren. Accordingly, pursuant to Clause 19.3(2) of the Standard Terms and Conditions (Exhibit B, p.48 CB) the notice was deemed to be served three business days after mailing, whether Foley received it or not. Mr Michael Simon, on behalf of Foley, after Mr Pauline's final address for Macquarie, belatedly attempted to argue that the hire-purchase agreement had not been determined by notice in accordance with Clause 14.1 of the Standard Terms and Conditions which required the notice to give the hirer 14 days in which to remedy the default (Exhibit B, p.46 CB). Such defence was never pleaded.

26 Each notice alleged breach of an essential term of the agreement; that $16,371.88 was due under the agreement; that Macquarie was treating the agreement as repudiated, accepting the repudiation, terminating the agreement, and the document gave notice that if the goods the subject of the agreement were not duly returned to

Macquarie the goods may be repossessed without further notice.

27 On 21 March 2001 Evans drove the green Chimaera to Pickles Auction Rooms at Peterson's suggestion, so that it could be included in one of three annual auction sales of "Prestige Cars" by that auction house at Darling Harbour.

28 Mark Anthony Gomez and Evans each gave evidence that, prior to Evans taking the car to Pickles Auction House, Gomez, while on holidays in Sydney, had offered $120,000 and paid Evans a cash deposit of $1,000 for the green Chimaera, which Gomez wished to take back to Western Australia to use as a drag-racing vehicle. The proposed sale had gone off because, upon the return of Gomez to Western Australia, Evans had rung him saying that Macquarie had insisted that the vehicle go to auction. Gomez took this as an attempt to extract more money from him for the car, and stated that he was no longer interested. Gomez swore that he had intended to get a loan of $119,000 from Esanda Finance Company to cover the balance of the purchase price.

29 I have some doubts as to the veracity of this evidence. If the offer were made at all, I could not imagine Esanda lending $119,000 on a vehicle which could not be registered for use on public roads, and I accept Peterson's evidence that no offer of $120,000 was conveyed to him by Evans, contrary to Evans' evidence to that effect. Had such offer been made, Peterson would certainly have accepted it. Moreover, no note of such offer appears in the Macquarie file notes (Exhibit A), by contrast with the other offers of $70,000 and $65,000.

30 The Pickles Group valued the green Chimaera at $60,000, and Peterson placed a reserve of $65,000 on the car, authorising the auctioneer to sell on the fall of the hammer to the highest bidder offering $65,000 or over. A highest bid below $65,000 had to be referred to Peterson for his ratification of such sale.

31 As a result of a letter to Pickles from Roger Payne, Principal Engineer – Certification, Vehicle Safety Standards, of the Commonwealth Department of Transport and Regional Services, the green Chimaera was initially withdrawn from sale. The letter (Exhibit DD, p.136 CB) stated that the vehicle had attached:

> " ... a Compliance Plate fitted under Approval No 10720 by TVR Engineering Ltd.
>
> As of 1 January 1996, Approval No 10720 was no longer a valid approval for the attachment of Compliance Plates to TVR Sportscars, as these vehicles no longer comply with the applicable Australian Design Rules.
>
> ...
>
> To sell such a vehicle on behalf of any second party such as a financial institution, may be an offence under the Trade Practices Act, unless it is clearly stated and represented that the vehicle does not have a valid compliance plate and therefore cannot be legally registered and used in transport within Australia.
>
> For your further information, it is known that there have been a number of TVR vehicles imported to Australia, post January 1996, including the subject vehicle, however none of these vehicles can be legally registered unless they are fitted with a valid compliance plate, and as above, there are no available options at this time to fit them with a valid compliance plate. "

32 The Macquarie file notes (Exhibit A) record telephone calls in May, July and September to Evans wherein he promised to resume payments to Macquarie.

33 On 27 September 2001 Evans promised a substantial repayment, although not the demanded $20,000, plus a second mortgage over a commercial property at Balmain in which he had an interest. He wanted Macquarie to pay $10,000, which he said was the cost of obtaining a compliance plate for the car. Peterson said that if Evans' proposal were put in place, Macquarie would then look at paying to achieve compliance, and Evans agreed. Nothing came of this proposal, however. On 30 November 2001, Payne advised Peterson by telephone that it was not likely that the car would ever comply. No more money or payment proposals were received by Peterson from Evans.

34 On 8 April 2001 letters of demand (Exhibits KK and LL, pp.139 and 140 CB) were sent by Macquarie's solicitors, Douros Lawyers, to each defendant, seeking $114,023.35 pursuant to the commercial hire-purchase agreement, or, alternatively, a proposal for a suitable repayment program, or legal action would follow. Evans then sent a letter of offer (Exhibit 1(RE), p.142 CB) to Ms Sarina Jackson of Douros Lawyers, offering, on behalf of both defendants, $5,000 on acceptance of the offer, and $1,000 per week "until we pay all the arrears back, then we would like to have our vehicle returned to us so we can then have it complied with or at least look at it in our garage and show people the bane of our lives."

35 In the face of this letter, I reject Evans' evidence that he had made a number of requests of Peterson to return the car so he could sell it.

36 The writ in this proceeding was filed on 6 May 2002. The green Chimaera was auctioned at three Pickles Auctions of "Prestige Vehicles". In each instance there was a sign on the car that "there was a re-registration issue – a problem with compliance, and registration for the car could be doubtful in Australia". This warning was repeated by the auctioneer. No bids were received at the first two auctions, and the vehicle was sold at the third auction on 10 March 2003 at the Sydney Convention and Exhibition Centre, Darling Harbour, for $50,250. After commission and advertising costs were deducted, Macquarie received $43,183.32 for the vehicle. Subsequently the purchaser unsuccessfully sought a cancellation of the sale and refund of the purchase price.

37 The proceeding came on for hearing before me on 15 October 2003. Mr Glen Pauline appeared for the plaintiff Macquarie; Mr Michael Simon appeared for the first defendant Foley; and the second defendant Evans appeared in person.

38 Graeme Alexander Cuthbert ("Cuthbert"), with twelve years' experience of valuing

vehicles, gave evidence on behalf of the first defendant. His enquiries of Commonwealth Customs established that a company known as TVR Queensland had gone into liquidation without paying Customs duty, an uplift tax, and sales tax on a series of imported TVR sportscars, including the green Chimaera. The estimated taxes and duty payable on this vehicle totalled $55,700, composed of sales tax $26,100, uplift tax $18,500, and Customs duty $11,100. It appears that this was the real reason why the Commonwealth withdrew the compliance plates in respect of these vehicles. I am unable to determine how these vehicles could be re-registered, if at all. On the evidence of Mr Cuthbert, it may at least require payment of Customs duty and uplift tax, a total of $29,600, in respect of the green Chimaera, but it is not clear whether the Commonwealth required payment of all moneys owing on this vehicle before registration or indeed all moneys outstanding on all these imported Chimaeras before any could be registered.

39 Mr Cuthbert valued the green Chimaera, if registered, at $105,000-115,000 in May 2001, and $60,000 to $65,000 in May 2003. He said that the vehicle would be worth two-thirds of its registrable value as a club car confined to racing on tracks and not driven on public roads. In May 2001 this valuation would amount to $70,000 to $76,000. On the other hand, Mr Cuthbert could point to no actual sales of these unregistered vehicles as club cars, although it stands to reason that the green Chimaera must have depreciated in value on the probabilities while left with the Pickles Group over two years.

40 The Standard Terms and Conditions have regard to age depreciation in Clause 1.1.20 (Exhibit B, p.41 CB), which defines "value of equipment" as (a) the net proceeds of sale no later than three months from the date of repossession, expiration or termination of the agreement, whichever is the latest, or (b) the amount certified

pursuant to a bona fide valuation not later than four months after repossession, expiration or termination, whichever is the latest. This term is consistent with the Credit Code applicable Australia-wide to hire-purchase agreements in respect of motor vehicles not obtained for commercial purposes. In my view, once Macquarie took control of the vehicle when it was delivered to Pickles auction house, Macquarie was obliged by the Standard Terms and Conditions of the agreement to sell the vehicle within three months or obtain a valuation within four months. It may be, as Mr Pauline for Macquarie submitted, that the draughtsperson of the Standard Terms and Conditions mistakenly omitted from the definition of "termination amount" in Clause 1.1(19) in the Standard Terms and Conditions (Exhibit B, p.40 CB) "(e) Less the value of the equipment." Clause 15.1 (Exhibit B, p.47 CB) requires the hirer, if the agreement is terminated by the owner, to pay to the owner on demand as a liquidated debt the "termination amount". Both Mr Simon for Foley and Mr Pauline for Macquarie agreed that this clause was void as a penalty because the termination amount omitted to take into account, by way of deduction from moneys owing, the value of the vehicle.

41 Whether this is the explanation or not, the Standard Terms and Conditions constitute a document put forward by Macquarie, and any doubt as to any of its terms must be resolved *contra proferentum*. Accordingly, whilst I do not accept Mr Cuthbert's 2001 valuation of $70,000 to 76,000, in my judgment the hirer and guarantor must be given credit for more than the net $43,183.32 obtained by Macquarie in the 2003 sale. The appropriate value of the vehicle is the $60,000 valuation by the Pickles Group on 27 March 2001 (Exhibit CC) when Macquarie obtained possession. This is consistent with SS.120 and 121 *Goods Act* 1958, inserted into the legislation by No. 74 of 1997 and applicable to commercial hire-purchase agreements, whereby if the owner repossesses but does not sell as soon as reasonably practicable after

taking possession the hirer is entitled to be credited with an amount equal to the value of the goods at the time that the owner took possession.

42 As the amended statement of claim does not claim interest on the unrepaid principal prior to the date of termination of the agreement, there is no need to resolve the conflict of fact as to whether Peterson agreed to waive interest on the unpaid principal while Evans was endeavouring to sell the green Chimaera. As to the right given to Evans to sell the vehicle, I find on the balance of probabilities that Evans voluntarily surrendered the vehicle for sale by auction by Pickles and did not seek its return, save subject to the proposed repayments of arrears of principal set out in Exhibit 1(RE), p.142 CB on 15 April 2002. The wording of that letter recognises that Evans understood that he had no right to demand the return of the vehicle. Indeed, if the hire-purchase agreement were not validly terminated by the notice of termination because of the failure to give the hirer fourteen days to remedy the default in repayment, then I find that the agreement was terminated when Evans took the green Chimaera to Pickles Auction House for sale by the Pickles Group on behalf of Macquarie. By that time Evans was substantially in arrears in repayments which he was making on behalf of Foley, and an inference can be drawn from subsequent persistent failure to honour promises to pay further moneys that, as Foley's alter ego, Evans no longer intended to perform his obligations, and repudiated the contract, which repudiation Macquarie was entitled to accept and sue for damages by way of compensation for the hirer's failure to perform his contractual obligations (*Shevill v Builders' Licensing Board* (1981-2) 149 CLR 620 at 624 per Gibbs CJ, and *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1984-5) 57 ALR 609 at 619 per Mason J). Alternatively, the return of the goods voluntarily by Evans as agent for Foley terminated the hire-purchase agreement, which could no longer "ripen into effectiveness" – *Pennicott v Pennicott* (1936) 30 TAS LR 111 at 115 and *McGill*

Willmott – Annotated Consumer Credit Code [78.16] p.561.

43 Accordingly, the argument of Mr Simon that there was a fundamental breach of the agreement by Macquarie, in failing to return the vehicle to Evans to allow him to make further attempts to sell it, is rejected.

44 At the time of the termination of the agreement in March 2001, the amount of principal outstanding was $98,745.51. As Macquarie retained possession of the green Chimaera from that point, and it did not sell within three months, the Pickles valuation of $60,000 should be deducted from the outstanding principal, reducing that figure to $38,745.51, to which should be added default interest at 8% from 27 March 2001 to 5 May 2002 (date of filing).

45 Clause 16.1 of the Standard Terms and Conditions (Exhibit B, p.47 CB) provides that the owner may charge interest at the overdue rate. The overdue rate of 8% per annum (Exhibit H, p.81 CB) amounts to $3,430.83, making a total of $42,176.34 outstanding at 5 May 2002.

46 I agree with Mr Pauline's submission that while Clause 15.1 of the Standard Terms and Conditions is void as a penalty, Macquarie is entitled to judgment for the unpaid principal by way of damages for breach of contract, together with interest under Clause 16.1, because Clause 25.3 (Exhibit B at p.49 CB) allows severance of any prohibited or unenforceable provision without prejudicing the remaining provisions of the agreement. Interest at the appropriate penalty rate, since 5 May 2002 to date of judgment, amounts to $7,325.39 for 546 days.

47 The first defendant, Foley, is liable for these sums under the hire-purchase agreement, and the second defendant, Evans, is severally liable pursuant to the guarantee and indemnity (Exhibit S, p.122 CB).

48 Accordingly there will be judgment against each defendant for $42,176.34 together with interest of $7,325.39 – a total sum of $49,501.73 together with costs to be taxed on County Court Scale C.

((ounsel's fees on Scale D).